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January 12, 2005

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Federal Communications Commission
Office of Secretary

Via Hand Delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

**Re: Ex Parte Presentation in MB Docket No. 02-144
Mediacom Communications Corporation**

Dear Ms. Dortch:

On January 12, 2005, Bruce Gluckman of Mediacom Communications Corporation ("Mediacom") and Seth Davidson of Fleischman and Walsh, L.L.P. met with Jonathan Cody, Legal Advisor to Chairman Michael K. Powell to discuss the above-referenced proceeding.

During the meeting, we discussed proposals for streamlining the process of determining the presence of "effective competition." Included with this letter is a written outline of the points made on behalf of Mediacom regarding this issue. We also discussed the need for continued Commission oversight with respect to local rate orders.

Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter and the attachment thereto are being submitted to the Secretary's office for inclusion in the record of the above-referenced proceeding.

If there are any questions regarding this matter, please communicate directly with the undersigned.

Respectfully submitted,



Seth A. Davidson

Enclosure

cc: Jonathan Cody
Qualex International
John Norton
Wanda Hardy

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THERE IS AN URGENT NEED TO EXPEDITE THE PROCESSING OF EFFECTIVE COMPETITION PETITIONS

The Media Bureau fails to act on effective competition petitions in a timely fashion, even when the petitions are unopposed.

- ▶ In 2003, around 40 petitions were filed. Nearly two years later, around 20 percent of those petitions are still pending. Of the petitions filed in 2003 that were resolved, the average time between public notice and a decision was over 11 months, *even for unopposed petitions*.
- ▶ The number of petitions being filed is accelerating rapidly: in 2004, over 100 petitions were filed. Fewer than a dozen of these petitions have been decided.

The Bureau's failure to resolve effective competition petitions in a timely manner creates uncertainty and imposes burdens on cable operators and local franchising authorities.

- ▶ Although an effective competition determination is deemed to be applicable back to the date on which it was filed, cable operators must continue to submit rate justifications for local review and obtain local approval of their basic service, equipment and installation rates until the petition is granted.

Unopposed effective competition petitions based on the "50/15" Competing Provider Standard can and should be deemed "automatically" granted.

- ▶ Changes in the competitive landscape warrant a revision in the manner in which the Commission considers effective competition petitions based on the "50/15" competing provider test.
 - DBS penetration was virtually non-existent in 1992. Now, DBS penetration exceeds 15 percent in the vast majority of states and tops 20 percent in more than half.
- ▶ Where a cable operator provides evidence that DBS penetration is 15 percent or greater in a particular franchise area, the petition should be deemed granted as to that area automatically if no opposition is filed.
 - Initial certifications filed by LFAs are deemed granted automatically after 30 days. Cable operators can challenge the certification by filing a timely petition for reconsideration or by filing a petition for de-certification.
 - A similar approach should be implemented where no opposition is filed to a petition for de-certification that contains a prima facie showing of 15 percent of greater DBS penetration in a particular franchise area. The automatic grant could be reflected in a simple public notice issued by the Commission (in lieu of a

formal order and memorandum). If an LFA elected to file a petition for reconsideration or a re-certification petition, the burden of proof would be placed on the LFA to demonstrate the absence of effective competition.

- ▶ Where the petition is opposed, and the cable operator has shown that there is 15 percent DBS penetration in both the franchise area and statewide, the operator should be permitted to proceed as if it is deregulated, subject to refunds and rate rollbacks if the petition ultimately is denied.

Other steps can be taken to ensure that LFAs have a fair opportunity to respond to petitions for effective competition.

- ▶ The deadline for filing an opposition could be extended from the current 20 days to 45 days.
- ▶ DBS providers (or a designated agent) should be required to provide community-specific penetration data to LFAs.

STATUS	Franchise Area	ST	County	CUID	Mailed to FCC	Public Notice	Contested
FILED- Pending	LMCC	MN	Hennepin	15 CUIDs	9/15/03	10/6/03	Yes
FILED- Pending	Huxley	IA	Story	IA0370	4/27/04	5/24/04	
FILED- Pending	Slater	IA	Story	IA0373	4/27/04	5/24/04	
FILED- Pending	Lakeside	IA	Buena Vista	IA0520	4/28/04		
FILED- Pending	Storm Lake	IA	Buena Vista	IA0040	4/28/04		
FILED- Pending	Luverne	MN	Rock	MN0205	4/28/04		
FILED- Pending	Pipestone	MN	Pipestone	MN0085	4/28/04		
FILED- Pending	Slayton	MN	Murray	MN0087	4/28/04		
FILED- Pending	Worthington	MN	Nobles	MN0204	4/28/04		
FILED- Pending	Colman	SD	Moody	SD0101	4/28/04		
FILED- Pending	Flandreau	SD	Moody	SD0026	4/28/04		
FILED- Pending	Gayville	SD	Yankton	none	4/28/04		
FILED- Pending	Yankton	SD	Yankton	SD0046	4/28/04		
FILED- Pending	Buffalo Center	IA	Winnebago	IA0083	5/12/04	5/24/04	
FILED- Pending	Hassan Valley	MN	McLeod	MN0985	5/19/04		
FILED- Pending	Hutchinson	MN	McLeod	MN0078	5/19/04		
FILED- Pending	Litchfield	MN	Meeker	MN0050	5/19/04		
FILED- Pending	Morris	MN	Stevens	MN0012	6/1/04		
FILED- Pending	Chokio	MN	Stevens	MN0179	6/1/04		
FILED- Pending	Tifton	GA	Tift	GA0044	6/15/04		
FILED- Pending	Louisville	IL	Clay	IL0284	6/17/04	7/2/04	
FILED- Pending	Spencer	IA	Clay	IA0023	6/21/04	7/9/04	
FILED- Pending	Moultrie	GA	Colquitt	GA0035	7/15/04		

FILED- Pending	Cairo	GA	Grady	GA0005	8/9/04	9/10/04	
FILED- Pending	Thomasville	GA	Thomas	GA0010	8/9/04	9/10/04	
FILED- Pending	Cedar Rapids	IA		IA0079	9/8/04	10/1/04	
FILED- Pending	Alta	IA		IA0021	11/1/04		
FILED- Pending	Carroll	IA		IA0050	11/1/04		Yes
FILED- Pending	Denison	IA		IA0016	11/2/04		
FILED- Pending	Red Oak	IA		IA0038	11/2/04		
FILED- Pending	Villisca	IA		IA0484	11/2/04		
FILED- Pending	Altoona	IA	Polk	IA0124	11/9/04	12/6/04	
FILED- Pending	Bondurant	IA	Polk	IA0196	11/9/04	12/6/04	
FILED- Pending	Carlisle	IA	Polk	IA0056; IA0963	11/9/04	12/6/04	
FILED- Pending	Clive	IA	Polk	IA0153; IA0964	11/9/04	12/6/04	
FILED- Pending	Des Moines	IA	Polk	IA0036	11/9/04	12/6/04	
FILED- Pending	Grimes	IA	Polk	IA0394	11/9/04	12/6/04	
FILED- Pending	Indianola	IA	Warren	IA0105	11/9/04	12/6/04	
FILED- Pending	Johnston	IA	Polk	IA0123	11/9/04	12/6/04	
FILED- Pending	Norwalk	IA	Warren	IA0126	11/9/04	12/6/04	
FILED- Pending	Pleasant Hill	IA	Polk	IA0125	11/9/04	12/6/04	
FILED- Pending	Urbandale	IA	DALLAS	IA0032; IA0968	11/9/04	12/6/04	
FILED- Pending	West Des Moines	IA	Polk	IA0041; IA0966	11/9/04	12/6/04	
FILED- Pending	Ridgecrest	CA	Kern	CA0559	11/23/04	12/13/04	
FILED- Pending	Flat Rock	NC	Henderson	NC1008	12/10/04	1/10/05	
FILED- Pending	Fletcher	NC	Henderson	NC1007	12/10/04	1/10/05	
FILED- Pending	Henderson	NC	Henderson	NC0050	12/10/04	1/10/05	

FILED- Pending	Hendersonville	NC	Henderson	NC0012	12/10/04	1/10/05
FILED- Pending	Laurel Park	NC	Henderson	NC0051	12/10/04	1/10/05
FILED- Pending	Bettendorf	IA		IA0031	12/13/04	1/10/05
FILED- Pending	Blue Grass	IA		IA0246	12/13/04	1/10/05
FILED- Pending	Davenport	IA		IA0030	12/13/04	1/10/05
FILED- Pending	Eldridge	IA		IA0158	12/13/04	1/10/05
FILED- Pending	Long Grove	IA		IA0241	12/13/04	1/10/05
FILED- Pending	Hampton	IL		IL0453	12/13/04	1/10/05
FILED- Pending	Camanche	IA		IA0062	12/13/04	1/10/05
FILED- Pending	Dewitt	IA		IA0101	12/13/04	1/10/05
FILED- Pending	Erie	IL		IL0333	12/13/04	1/10/05
FILED- Pending	Lyndon	IL		IL1054	12/13/04	1/10/05
FILED- Pending	Prophetstown	IL		IL0332	12/13/04	1/10/05
FILED- Pending	McRae	GA		GA0026	12/15/04	1/3/05
FILED- Pending	Nevada	IA		IA0143	12/20/04	1/10/05

EFFECTIVE COMPETITION STREAMLINING

(MB Docket No. 02-144)

MEDIACOM BACKGROUND

- Began in 1996.
- Currently 8th largest cable MSO.
 - ▶ Approximately 2.7 million homes passed.
 - ▶ Approximately 1.6 million basic customers.
 - ▶ Serves around 1,500 small and mid-sized communities in 23 states.
 - ▶ 85% of systems serve 2,000 or fewer subscribers.
- Has invested over \$1 billion to upgrade its systems.
- Over 94% of Mediacom's plant has been upgraded to provide digital video, high-speed Internet access, video-on-demand and high definition television.

COMPETITION IS FLOURISHING

- DBS now accounts for more than 20% of all MVPD subscribers.
 - ▶ More than 150% increase in DBS subscribers since 1998.
 - ▶ Numerous independent forecasters predict continued growth for DBS and decline in cable's share.
 - ▶ In his statement issued in connection with the EchoStar/DirecTV merger proceeding, Chairman Powell has recognized that DBS is a "viable competitor in every market in the country," with growth rates "2.5 times larger than those of cable."
- Mediacom faces overbuilders in several communities.
 - ▶ Often municipally owned.
 - ▶ Typically enjoy economic advantages due to subsidization from local tax dollars or monopoly municipal utility revenue.

- Mediacom's competitors typically do not face the same costly regulatory obligations.
 - ▶ Often do not need a franchise.
 - ▶ No institutional network mandates.
 - ▶ No public, educational and governmental channel obligations.
 - ▶ No leased access requirements.
 - ▶ No franchise fee payments.
 - ▶ No rate regulation.
 - ▶ No customer service standards.

THE EFFECTIVE COMPETITION PROCESS SHOULD BE STREAMLINED

- Would permit ready recognition of undisputed facts and focus attention on truly material elements of proof.
- Would ease administrative burdens on cable operators and FCC staff alike.
- Should clear up confusion among local franchising authorities ("LFAs"), thereby reducing oppositions.
- Would promote timely, efficient and consistent action by Commission.

THE BURDEN OF PROOF SHOULD BE NEUTRAL

- Assigning the burden of proof was a close call even back in 1994.
- Competitive landscape has changed dramatically.
- Effective competition determinations should be based on a preponderance of the evidence.
 - ▶ Unopposed petitions could be granted automatically at close of comment period.
 - ▶ LFAs seeking to regulate rates for the first time would have to show the absence of effective competition by a preponderance of the evidence, much as they are required to do when re-certifying after a finding of effective competition.

EFFECTIVE COMPETITION FINDINGS BASED ON THE PRESENCE OF DBS PROVIDERS CAN BE SIMPLIFIED

- The Commission should take official notice that DirecTV and EchoStar satisfy the first prong of the 50/15 competing provider test.
 - ▶ The Commission has repeatedly recognized that DBS is technically available throughout the continental United States.
 - ▶ There are no regulatory, technical or other impediments to the receipt of DBS service.
 - ▶ DirecTV and EchoStar unquestionably offer programming “comparable” (as defined by the FCC rules) to that of any cable operator.
 - ▶ It is beyond dispute that U.S. consumers today are universally “reasonably aware” of the availability of DBS service.
- DirecTV, EchoStar and retailers that offer their products advertise and market extensively through national, regional and local media, including newspapers and magazines, television and radio, and the Internet, as well as by means of point-of-purchase brochures, door hangers, direct mail solicitations, and e-mail.
 - * According to its most recent 10-K filing with the Securities and Exchange Commission, EchoStar spent well over \$100 million on advertising and related expenses a year, and had overall marketing expenses exceeding \$1 billion a year, for 2000 and 2001.
 - * Multichannel News reports that, in support of its Fall 2002 “NFL Sunday Ticket” promotion alone, DirecTV planned to air spots on national broadcast and cable networks, including runs during NFL games. Print ads were slated for USA Today, Parade, USA Weekend and local newspapers in 41 markets. Radio spots were scheduled in 27 markets.
 - * According to VMS, a media tracking service, there have been over 200 national and local ads on broadcast and cable channels since January 2002 for DirecTV and EchoStar’s Dish Network.

- The fact that DBS penetration in the United States now exceeds 20 percent justifies official notice by the Commission that potential subscribers are reasonably aware of this service.
- Where DBS subscribership in a particular community exceeds 15%, consumers obviously are reasonably aware of the availability of DBS.
- The Commission should expressly confirm that SkyTRENDS data may be relied upon in effective competition showings.

**EFFECTIVE COMPETITION RELIEF SHOULD NOT BE LIMITED TO THE
“LARGEST” PROVIDER IN A COMMUNITY**

- Currently, the FCC requires a showing that the combined penetration of all MVPDs “other than the largest” exceeds 15 percent.
- Given that SkyTRENDS refuses to disclose the breakdown between DirecTV and EchoStar, it is often difficult to prove which MVPD is the largest.
- Congress could not reasonably have intended to preclude effective competition relief to MVPDs other than the “largest.”
- Thus, effective competition relief should be available to any MVPD, regardless of whether it is the largest, so long as it demonstrates that it faces competition from one or more competing MVPDs with aggregate penetration of 15% or more.